



# NEPA Compliance for Corps Decisions under the BDCP

U.S. ARMY CORPS OF ENGINEERS

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## Background

The Bay Delta Conservation Plan (BDCP) is a Habitat Conservation Plan (HCP) being developed to promote the recovery of endangered, threatened and sensitive fish and wildlife species and their habitats in the Sacramento-San Joaquin Delta in a way that will improve reliability of water exports.

If approved by U.S. Fish and Wildlife Service and National Marine Fisheries, the BDCP would provide "Take" under Section 10 of the Endangered Species Act for the following actions:

- State Water Project (SWP) diversion and maintenance from the existing SWP points of diversion at Clifton Court Forebay and Barker Slough Pumping Plant;
- SWP Operation and Maintenance of the Skinner Delta Fish Protective Facility and Banks Pumping Plant;
- Construction, operation, and maintenance of a new SWP north of Delta intake facility and conveyance (pipeline or canal);
- Construction, operation, and maintenance of a new SWP North Bay Aqueduct intake facility and conveyance (pipeline or canal);
- Numerous habitat restoration actions to restore: 65,000 acres of freshwater and brackish tidal, subtidal, and transitional habitats; 20 linear miles of channel margin habitat; 5,000 acres of riparian habitat; 2,000 acres of grassland habitat; 400 acres of nontidal perennial emergent wetland and nontidal perennial aquatic habitat; up to 89 acres of vernal pool complex habitat; and 320 acres of managed seasonal wetland habitat; and
- Numerous physical and operational alterations to the Yolo Bypass to improve fish passage and enable 10,000 acres to be subject to an increased duration and frequency of inundation.

A joint Environmental Impact Report/Environmental Impact Statement (EIR/EIS) is being prepared under the California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA), respectively, for the BDCP. The CEQA lead agency is DWR and the NEPA lead agencies, serving jointly, are the BOR, USFWS and NMFS. The Lead Agencies intend for the BDCP EIR/EIS to be a programmatic document for the entire BDCP and provide project-level detail for the proposed construction of a new SWP north of Delta intake facilities and conveyance (pipeline or canal) and the operations of the new intakes and the existing SWP and CVP facilities. The Corps agreed to be a cooperating agency on the EIS in November 2008.

The Corps has jurisdiction over BDCP-related actions under Section 404 of the Clean Water Act (CWA 404) and Sections 10 and 14 of the Rivers and Harbors Act of 1899 (RHA 10 and 14). Actions that involve a discharge of dredged or fill material in waters of the U.S. under CWA 404 and/or structures or work located in, on or over navigable waters under RHA 10 require a Department of the Army permit under the Corps Regulatory Program, which is administered by the District's Regulatory Division. For action that affect Federal projects, permission under RHA 14, also known as Section 408, is required. Section 408 is administered by or processed through the District's Operations Branch depending on the type of action. Because the Corps jurisdiction and scope is not the entire BDCP program, the Corps

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will not make one permit decision on the BDCP as a whole. Many of the individual actions (parts of the whole) will however require Corps approval.

The first BDCP action DWR proposes to undertake is the construction of new water intakes, a new water conveyance pipeline or canal, and new operations of the State and Federal water projects. The Corps jurisdiction over this initial project of the BDCP is CWA 404, RHA 10 and Section 408. The proposed schedule of BDCP permit/permission process proposed by DWR is as follows:

- Mid-2013 - Completion of BDCP EIR/EIS
- Mid-2015 - Applications for the construction of water intakes, conveyance pipeline or canal, and new operations of the State and Federal water projects to be submitted to Corps for CWA 404 and RHA 10 and 14.
- Mid-2017 – Corps permit/permission decisions for the construction of new water intakes, a new water conveyance pipeline or canal, and new operations of the State and Federal water projects from Corps

This proposed schedule is dependent on several factors, most of which are beyond the control of the Corps. Sacramento District continues to meet, consult, coordinate, and cooperate with DWR and appropriate Federal agencies to ensure all parties understand the necessary requirements for Corps authorization. At this point in time, there appears to be a high probability that DWR and lead Federal agencies will not meet this schedule due to public controversy, inability to obtain necessary technical data to support engineering and design, and the potential for litigation.

## **Corps NEPA Compliance Strategy**

As a cooperating agency, the Corps intends to use the EIR/EIS to the maximum extent possible to facilitate decision-making. At the program level, the Corps will recognize the BDCP EIR/EIS as a “Tier 1” document upon which later project-specific NEPA documents would rely. The Corps would adopt the EIR/EIS and make permit/authorization decisions on that element of the BDCP, provided the EIR/EIS includes sufficient and appropriately detailed information about the construction and operation of the intake facilities and conveyance and addresses Corps concerns and program needs.

For project-level compliance with NEPA, the BDCP EIR/EIS will need to address several factors and requirements to support the Corps’ permitting actions.

1. Overall Purpose. The EIR/EIS should include a specific overall purpose statement for the purpose of evaluating alternatives under EPA’s 404(b)(1) guidelines. Although the goal would be to have a single NEPA/404(b)(1) purpose statement, a separate, Corps approved, CWA 404 overall purpose statement may be needed to ensure appropriate alternatives are evaluated by the Corps. The BDCP EIS/EIR should also explain the use and relevance of the 12 March 2012 and 3 May 2012 agreements on the overall purpose statement for the BDCP, and should ensure that sufficiently detailed information about each of the alternatives needed to comply with 404(b)(1) is included and merged into the reasonable range of alternatives addressed in the document.

2. Alternatives. The alternatives analysis should be thorough enough to use for both the Corps’ public interest review and compliance with the 404(b)(1) guidelines. The BDCP EIR/EIS will need to address all of the Corps public interest review factors, including commercial and recreational boating, and include relevant details on practicable alternatives that would have less impact on the aquatic

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environment. The Corps will need to concur with the range of alternatives as well as the evaluation criteria upon which the alternative will be evaluated.

3. Mitigation Sequencing. The BDCP EIR/EIS should describe the specific measures to avoid, minimize and mitigate impacts to waters of the U.S., including wetlands. A plan for compensatory mitigation should have specific information and be developed in accordance with 33 CFR Part 332.

4. Delineation of Wetlands and Other Waters of the United States. The EIS/EIS should include a detailed assessment of the location, type and quality of the wetlands and other waters of the U.S. in the vicinity of the proposed project, as well as alternatives, to determine the impacts. All delineations should be confirmed by the Corps before completing the draft NEPA document.

5. Executive Order 11988. The BDCP EIR/EIS should demonstrate compliance with Executive Order 11988, Floodplain Management.

6. Flood Risk Impacts. The BDCP EIR/EIS should disclose impacts to flood risk, including transfer of risk and residual risk, in the project area and throughout the flood system, both individually and cumulatively. Section 408: As with any document including project-specific coverage, the NEPA compliance document needs to adequately support the final design of the project.

7. Cumulative Impacts. A cumulative impacts analysis is required pursuant to NEPA and the Section 404(b)(1) Guidelines. The cumulative impact analysis should consider only those past actions that have a continuing, additive, and significant relationships to the effects of the proposed action and its alternatives. In addition, the cumulative impact analysis in the BDCP EIR/EIS should focus on aggregate effects of relevant past actions, rather than details of the individual past actions.

## **Need for Additional NEPA Documentation**

At this time, and based on indications by DWR, the EIR/EIS under development may not be adequate to support Corps Section 408 permission as it currently is based on 10% designs which leaves a large margin for changes in design and impacts. As such, the need for additional NEPA documentation is anticipated, although this cannot be determined until at least until 65% designs have been provided and reviewed.

## **Point of Contact**

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